IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SIERRA CLUB, INC. and SIERRA NEVADA FOREST PROTECTION CAMPAIGN, Plaintiffs, v. DALE BOSWORTH, in his official capacity as Chief of the U.S. Forest Service; JOHN BERRY, in his official capacity as Forest Supervisor of the Eldorado National Forest; LAURIE TIPPIN, in her official capacity as Forest Supervisor of the Lassen National Forest; UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture; ANN VENEMAN, in her official capacity as Secretary of the U.S. Dept. of Agriculture; and UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants.	2:04-cv-2114-GEB-DAD ORDER

Pending are cross-motions for summary judgment and Plaintiffs' motion to supplement the Administrative Record ("AR"). Plaintiffs contend the categorical exclusion ("CE") established by the United States Forest Service ("USFS") for fuel reduction projects ("Fuels CE") violates the National Environmental Policy Act ("NEPA"); and that the application of the Fuels CE to the timber project in the

Eldorado National Forest also violates NEPA.[1] Defendants counter that the Fuels CE, and its application to the Eldorado National Forest projects do not violate NEPA and must be upheld.

I. BACKGROUND

A. Overview of NEPA

NEPA, which is prescribed in pertinent part at 42 U.S.C. §§ 4321-4347, is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. NEPA's purpose is to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . ." 42 U.S.C. § 4321. "NEPA is a procedural statute that does not 'mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions.'" High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004) (quoting Cuddy Mountain v. Alexander, 303 F.3d 1059, 1070 (9th Cir. 2004)).

NEPA requires "all agencies of the Federal Government" to include an environmental review document "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "In determining whether to prepare an

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[1] Plaintiffs' motion also addresses the application of the Fuels CE to a project in the Lassen National Forest; however, at the hearing on the motions held on July 18, 2005, Plaintiffs withdrew their challenge against the project in the Lassen National Forest since the USFS has decided not to proceed with that project.

environmental impact statement the Federal agency shall . . . [d]etermine . . . whether the proposal is one which: (1) Normally requires an environmental impact statement, or (2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion)." 40 C.F.R. § 1501.4.

A categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment [("EA")] nor an environmental impact statement [("EIS")] is required." Id. § 1508.4. "In determining whether an action will 'significantly' effect the environment, the CEQ regulations provide certain factors that should be considered [including], among others, (1) the degree to which the proposed action affects public health or safety, (2) the degree to which the effects will be highly controversial, (3) whether the action establishes a precedent for further action with significant effects, and (4) whether the action is related to other action which has individually insignificant, but cumulatively significant impacts." Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999) (citing 40 C.F.R. § 1508.27(b)).

When an agency determines that a category of actions should be categorically excluded from NEPA review, the agency must include in its regulations "specific criteria for and identification of" actions that qualify for the categorical exclusion, and must also "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." Id. §§ 1507.3(b)(2)(ii), 1508.4. "In such extraordinary circumstances, a categorically excluded action would nevertheless trigger preparation of an EIS or an

EA." California v. Norton, 311 F.3d 1162, 1168 (9th Cir. 2002). Furthermore, the agency must publish the proposed CE in the Federal Register, provide an opportunity for public comment, and submit the CE to the Council on Environmental Quality ("CEQ") for review and approval. 40 C.F.R. § 1507.3(a); 48 Fed. Reg. 34,263, 34,265 (July 28, 1983).

At issue is whether the USFS's Fuels CE and/or the application of it to the Eldorado National Forest projects should be set aside. A court should "set aside [an agency's] actions, findings, or conclusions if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1118 (9th Cir. 2004) (quoting the Administrative Procedure Act ("APA") at 5 U.S.C. § 706(2)(A)). "Courts apply a 'rule of reason' standard in reviewing the adequacy of a NEPA document." Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt., 387 F.3d 989, 992 (9th Cir. 2004) (citing Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001)). "Under this standard, we ask 'whether an [environmental review] contains a reasonably thorough discussion of the significant aspects of the probable environment consequences.'" Churchill County, 276 F.3d at 1071 (citation omitted).

"The court must defer to an agency conclusion that is 'fully informed and well-considered,' but need not rubber stamp a 'clear error of judgment.'" Anderson v. Evans, 371 F.3d 475, 486 (9th Cir. 2004) (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998)). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that

other values outweigh the environmental costs. Thus the pertinent question for the Court is not whether [it] would have arrived at the same decision as that of the agency but merely whether the agency's decision was an informed one." Australians for Animals v. Evans, 301 F. Supp. 2d 1114, 1120 (N.D. Cal. 2004).

"District courts are not empowered to substitute their own judgment for that of the government agency." Id. at 1122 (quoting Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000)). The Court's "task in reviewing NEPA claims is simply to ensure that the procedure followed by the agency resulted in a reasoned analysis of the evidence before it, and that the agency made the evidence available to all concerned." Cold Mountain v. Garber, 375 F.3d 884, 893 (9th Cir. 2004) (quoting Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985)).

Further, when considering "an agency's actions under NEPA . . . courts must also be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency." Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 993. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Or. Natural Resources Council, 490 U.S. 360, 378 (1989).

B. Factual and Procedural Background

In response to concerns about the fire risk created by the accumulation of hazardous fuels in many national forests, in August 2002, President Bush "established the Healthy Forests Initiative,

directing the Departments of Agriculture and Interior and the Council on Environmental Quality to improve regulatory processes to ensure more timely decisions, greater efficiency, and better results in reducing the risk of catastrophic wildfires by restoring forest help." 67 Fed. Reg. 77,038, 77,039 (Dec. 16, 2002). "[T]he Departments of Agriculture and the Interior" responded to the Healthy Forests Initiative by "consider[ing] whether new categorical exclusions could be created for some of the fire management activities already undertaken by those Departments." (Defs.' Mem. in Opp'n to Pls.' Summ. J. Mot. & Supp. Defs.' Summ. J. Mot. ("Defs.' Mot.") at 4-5.) "The Departments conducted an extensive review of over 2,500 past hazardous fuel reduction and rehabilitation projects in order to determine whether certain types of projects did not individually or cumulatively have significant environmental effects and could therefore form the basis for new categorical exclusions." (Id. at 5; see 68 Fed. Reg. 33,814 (June 5, 2003).) "The agencies also considered peer[-]reviewed scientific literature concerning the effects of hazardous fuel reduction activities." (Defs.' Mot. at 5.) "Based on this project review, the Departments identified a set of limited hazardous fuel reduction and rehabilitation projects that would not normally have significant effects on the environment. The Departments proposed these limited categories of projects as a new categorical exclusion in a Federal Register notice, and sought public comment and review and approval by CEQ." (Id.; see 67 Fed. Reg. 77,038 (Dec. 16, 2002).)

After revising the categories in response to public and agency comments, on June 5, 2003, the USFS published the final Fuels CE in the Federal Register. 68 Fed. Reg. 33,814 (June 5, 2003). The

Fuels CE delineates what actions are categorically excluded as follows:

> • Hazardous fuels reduction activities using prescribed fire not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. Such activities:
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> • Shall be limited to areas (1) in wildland-urban interface and (2) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface;
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> • Shall be identified through a collaborative framework as described in "A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy Implementation Plan;"
>
> • Shall be conducted consistent with agency and Departmental procedures and applicable land and resource management plans;
>
> • Shall not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness;
>
> • Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and may include the sale of vegetative material if the primary purpose of the activity is hazardous fuels reduction.
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> • Post-fire rehabilitation activities not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds) to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or to repair or replace minor facilities damaged by fire. Such activities:
>
> • Shall be conducted consistent with agency and Departmental procedures and applicable land and resource management plans;
>
> • Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and

- Shall be completed within three years following a wildland fire.

68 Fed. Reg. 33,814.

The CEQ reviewed the proposed categorical exclusions and determined that they are "in conformance with NEPA and the CEQ regulations." (AR 78.) "Plaintiffs challenge only that portion of the CE which relates to projects designed to reduce hazardous fuels." (Defs.' Mot. at 2.)

"In 2004, the USFS applied the Fuels CE to at least three projects in the Eldorado National Forest[: the] Grey Eagle Fuels Reduction (logging 984 acres and prescribed burning 4,149 acres); [the] Forest Guard Fuels Reduction (logging and prescribed burning 412 acres); and [the] Rockeye Fuels Reduction Project (logging and prescribed burning 513 acres)." (Pls.' Mem. Supp. Summ. J. Mot. ("Pls.' Mot.") at 6.) "Plaintiffs also challenge the application of the Fuels CE to [those] projects . . . ." (Defs.' Mot. at 2.)

II. ANALYSIS

A. Motion to Supplement the Administrative Record

Plaintiffs move to supplement the administrative record with several documents and expert declarations. Plaintiffs argue this supplementation is required because "judicial review of agency action must be based on the 'full administrative record,' and [since] the Forest Service omitted documents that were before the agency at the time the Fuels CE was under review . . . ." (Pls.' Mot. to Supplement AR at 1.) Plaintiffs also contend "the administrative record [should be supplemented] to ensure that the agency considered all relevant factors and to explain or clarify a technical matter; thus guaranteeing a fair and effective judicial review of the agency

action." (Id.)

Since "Defendants do not oppose supplementation of the record with the '10-Year Comprehensive Strategy Implementation Plan,' . . . the Forest Service Handbook, . . . the Scoping Notices and Schedule of Proposed Actions in the Eldorado and Lassen National Forests . . . or the Healthy Forest Report[, and since the] series of memoranda from the Forest Service Office of General Counsel . . . were submitted to the Forest Service in public comments on the Forest Service's decision to revise its extraordinary circumstances provisions, and are appropriately part of the administrative record," those documents will supplement the record. (Defs.' Opp'n to Mot. to Supplement AR at 1-2.)

"Thus, the sole dispute [is] whether it is appropriate to supplement the record with the declarations of [Craig] Thomas, [Dr. Denis] Odion and [Monica] Bond." (Id. at 2.) "Generally, judicial review of agency action is limited to review of the administrative record." Animal Def. Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." Fl. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). However, supplementation is permitted: "(1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, . . . (3) when [it] is necessary [for] expla[nation of] technical terms or complex subject matter[, or (4)] when plaintiffs [need it to] make a showing of agency bad faith." Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996)

(quoting Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 997 (9th Cir. 1993) & Nat'l Audubon Soc'y v. U.S. Forest Serv., 46 F.3d 1437, 1447 n.9 (9th Cir. 1993)) (internal quotation marks omitted).

Plaintiffs argue the declarations of Odion, Bond, and Thomas "will assist the Court in determining whether the Forest Service has considered all relevant factors." (Pls.' Mot. to Supplement AR at 10.) Plaintiffs contend the declarations

> highlight the breadth of information the Forest Service was not privy to because the agency did not do an environmental assessment or environmental impact statement before promulgating the Fuels CE or approving the challenged projects. Second, they explain . . . how the Forest Service's own administrative record demonstrates that the . . . [p]rojects will significantly impact a number of sensitive species. Third, due to the incomplete information in the Administrative Record regarding individual and cumulative impacts, two of the declarants conducted a field visit to various units in the Project Areas and reviewed past, present and reasonably foreseeable projects, so that [Plaintiffs] could explain to this Court the true cumulative impacts of three of the challenged projects. Finally, the Declarations provide background information that is needed to effectively review the Fuels CE and its application to the challenged projects.

(Id. at 10-11.)

Further, Plaintiffs contend that "[t]he effectiveness of fuel reduction activities on the spread of wildfire has been the 'subject of on-going scientific study by teams of researchers, analyzing technical and complex environmental and biological information' and Dr. Odion's declaration will be helpful to this court by 'highlighting . . . deficiencies in the [Forest Service's] environmental review process.'" (Id. at 11 (quoting Env't Now! v. Espy, 877 F. Supp. 1397, 1404 (E.D. Cal. 1994)).) Plaintiffs argue

"Dr. Odion's entire declaration demonstrates that the environmental review performed by the Forest Service in promulgating the Fuels CE and approving the . . . challenged projects was deficient because it did not consider a wealth of scientific information[; and therefore,] Dr. Odion's declaration will help this court determine whether the Forest Service has considered all relevant factors in promulgating the Fuels CE." (Pls.' Mot. to Supplement AR at 11.)

Plaintiffs contend Monica Bond's declaration would "help explain why the Forest Service's decision making process was insufficient with regard to the agency's analysis of individual and cumulative environmental impacts for the challenged Eldorado Projects." (Id.) Plaintiffs contend "[t]he Declaration highlights that the Administrative Record is devoid of any information to support the Forest Service's allegation that the Fuels CE and the projects approved under it will have no significant impacts [and] demonstrates that the projects will have both individual and significant impacts on the California spotted owl." (Id. at 11-12.)

Plaintiffs argue that "Craig Thomas'[s] Declaration provides background information that will assist this Court in determining whether the Forest Service has considered all relevant information[; and] provides background information on past, present, and future logging projects on both the Eldorado and Lassen National Forests." (Id. at 12.) Furthermore, Plaintiffs contend these declarations will "explain and illuminate the complex scientific issues of fire and wildlife ecology." (Id.)

Defendants argue the record should not be supplemented with Dr. Odion's testimony because that "testimony is in large part non-responsive to the actual projects being challenged, is mere expert

disagreement with the agency, and should have been submitted to the agency during the public comment periods." (Defs.' Opp'n to Mot. to Supplement AR at 6.)

Defendants object to Ms. Bond's declaration, arguing that it "constitutes little more than an articulation of her disagreement with the scientific conclusions reached by . . . the Forest Service's own wildlife experts," which should not be adjudicated. (Id. at 9.) Further, Defendants argue "Ms. Bond's testimony does not fall into any of the exceptions under which this Court may consider extra-record evidence, but instead disputes the agency's conclusions regarding the projects' impacts on the California spotted owl." (Id.)

Defendants also object to Mr. Thomas's declaration, arguing that it "provides no competent evidence that the Forest Service failed to consider all relevant factors, and indeed does not identify any 'past present and future logging projects' the agency failed to consider. Instead Mr. Thomas offers legal and scientific argument that he is not qualified to give." (Id. at 4.)

Finally, Defendants contend that if Plaintiffs' supplementation motion is granted, the record should also be supplemented with the following rebuttal declarations: "the declaration of Jeffrey Barnhart, responding to the allegations made in the declaration of Dr. Odion[;] the declaration of Charis Parker, responding to the allegations made in the declaration of Ms. Bond with regard to the Grey Eagle and Rockeye Projects[; and] the declaration of Jennifer Ebert responding to the allegations made in the declaration of Ms. Bond with regard to the Forest Guard Project." (Id. at 10.)

Since the declarations of Bond and Odion are offered to assist the Court in determining whether the USFS considered all relevant factors and to assist in explaining complex scientific issues, Plaintiffs' motion to supplement the administrative record with these declarations is granted. Portions of the Thomas declaration are also admitted for this purpose; but Thomas's legal arguments and emotional distress arguments are excluded because they are inappropriate expert opinions. See Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1027 (N.D. Cal. 2002) (granting motion to strike a declaration "because th[e] declaration primarily contain[ed] legal argument rather than evidentiary matter"); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773-776 (1983) (stating that "psychological health damage [is not] cognizable under NEPA"). Furthermore, Defendants' request that the Court consider its rebuttal declarations is also granted. See Tri-Valley Cares v. U.S. Dep't of Energy, 2004 WL 2043034, at *3 (N.D. Cal. 2004) (granting "Defendants leave to file rebuttal declarations because they had not had an opportunity to respond to the extra record materials [and] Defendants' response was essential to [its] review of the underlying motions.").

B. Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment, arguing that

> the Forest Service's promulgation of the Fuels CE was arbitrary and capricious . . . because: 1) the terms of the Fuels CE are contrary to 40 C.F.R. §§ 1508.4 and 1507.3, in that they do not specify and identify adequately the actions to be covered, create an unlawful 'case-by-case' categorical exclusion, and fail to establish properly 'extraordinary circumstances'; and 2) the actions to be covered are not appropriate for categorical exclusion under 40 C.F.R. § 1508.4 because they have individual and/or cumulative significant

> effects; and the [USFS]'s findings of non-significance were arbitrary and capricious and contrary to the evidence before the agency.

(Pls.' Mot. at 1.) Plaintiffs also contend that "the Fuels CE was not in accordance with NEPA . . . because the [USFS] failed to prepare an environmental assessment or environmental impact statement for the Fuels CE prior to approving it" and "the Fuels CE cannot be applied to the challenged timber projects in the . . . Eldorado National Forest in California because they . . . involve individual and/or cumulative significant effects." (Id.)

Defendants counter that "[t]he Fuels CE was promulgated in compliance with all law and regulations on the basis of an exhaustive record, and the [USFS] properly determined that the . . . specific projects challenged by Plaintiffs are covered by the Fuels CE." (Defs.' Mot. at 41.)

1. Was the promulgation of the Fuels CE in violation of NEPA?

a. Does the Fuels CE violate the CEQ regulations?

Plaintiffs contend "the terms of the Fuels CE are contrary to 40 C.F.R. §§ 1508.4 and 1507.3, in that they do not specify and identify adequately the actions to be covered, create an unlawful 'case-by-case' categorical exclusion, and fail to establish properly 'extraordinary circumstances.'" (Pls.' Mot. at 1.) Defendants rejoin that "the Departments have complied with all regulatory requirements in promulgating the Fuels CE[: t]he CE identifies a specific class of actions, and the Forest Service has appropriately defined the extraordinary circumstances that would preclude authorizing a project under the CE." (Defs.' Mot. at 15.)

Plaintiffs contend "[t]he Fuels CE is contrary to [1507.3(b)(2)(ii)] because the actions to be covered are not specified

or identified [and i]nstead, identification of the actions is left to future, *ad hoc* determination." (Pls.' Mot. at 8.) The CEQ regulations require agencies promulgating a CE to include "[s]pecific criteria for and identification of those typical classes of action" which are covered by the CE. 40 C.F.R. § 1507.3(b)(2)(ii). Plaintiffs argue there is noncompliance with this regulation because "the Fuels CE states that the projects to be covered by it: '[s]hall be identified through a collaborative framework as described in [the] 10-Year Comprehensive Strategy Implementation Plan[, which] does not, however, "identify" the "category of actions" to be covered by a categorical exclusion.'" (Pls.' Mot. at 8-9.) Plaintiffs also argue that "[t]he Fuels CE . . . does not define key terms used in the categorical exclusion . . . ." (Id. at 9.)

Defendants counter that "the Fuels CE sets forth in explicit detail specific criteria for identifying the 'classes of action' to which it applies." (Defs.' Mot. at 8.) Defendants assert the Fuels CE "is limited to projects designed to meet a specific purpose, the reduction of hazardous fuels[; it is] limited to specific types of treatments on specific acreages[;] projects may not use herbicides, pesticides or involve construction of new roads or other permanent infrastructure[; it] is limited geographically to the wildland-urban interface or areas in fire condition classes 2 or 3 in Fire Regime Groups I, II or III[; and it] cannot be applied to projects . . . unless the project is identified through the collaborative process set forth in the 10-Year Comprehensive Strategy Implementation Plan." (Id. at 8-9 (citing 68 Fed. Reg. at 33,824).) Defendants argue the requirement that all projects under the Fuels CE be identified through the 10-Year Comprehensive Strategy Implementation Plan's collaborative

framework "does not mean . . . that the CE can be broadened to include projects outside the 'typical classes of action' identified in the CE; it simply means that when determining where to implement a project and what type of treatment methods to use – within the types already authorized by the CE – the Forest Service will collaborate with state, local and tribal governments." (Defs.' Mot. at 9.)

Plaintiffs further contend that the Fuels CE creates a case-by-case categorical exclusion, which is prohibited by 40 C.F.R. §§ 1507.3(b)(2)(ii) and 1508.4, since "by leaving determination of whether a project is covered by the Fuels CE to the process of the '10-Year Comprehensive Strategy Implementation Plan,' the Fuels CE refers to another, future decision-making process, which is itself without specificity." (Pls.' Mot. at 9.) Plaintiffs support this contention by citing to memoranda from the Department of Agriculture Office of General Counsel ("OGC") for the proposition that case-by-case categorical exclusions violate the CEQ regulations. (Id. at 10.) Defendants rejoin that Plaintiffs' argument fails because "[u]nlike the CEs addressed in the OGC memoranda, the Fuels CE identifies a very discrete and precise category of actions that may be included, and unlike the true 'case-by-case' CEs criticized by the OGC, the Fuels CE does not allow the Forest Service to categorically exclude, based on a case-by-case determination of significance, other activities not included in the CE." (Defs.' Mot. at 13.)

Finally, Plaintiffs argue that the Fuels CE violates 40 C.F.R. § 1508.4, which requires categorical exclusions to "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. The USFS Handbook directs land managers to consider certain "resource

conditions" when determining whether the proposed action involves extraordinary circumstances that warrant further environmental review. 67 Fed. Reg. 54,622, 54,627 (Aug. 23, 2002). The "resource conditions" include: threatened and endangered species or their designated critical habitat, or USFS sensitive species; flood plains, wetland, or municipal watersheds; wilderness areas; inventoried roadless areas; research natural areas; Native American religious or cultural sites; and archaeological or historical sites. Id. Plaintiffs contend the "provision for 'extraordinary circumstances in the [USFS] Handbook . . . does not meet the requirements of 40 C.F.R. § 1508.4 because the [USFS] did not specify or identify the extraordinary circumstances [but rather] qualified the definition and application of the 'extraordinary circumstances exception based on the 'degree of potential effect' of an action on the 'resource conditions.'" (Pls.' Mot. at 11 (citing Exh. H at § 30.3(2)(a)).) Plaintiffs argue "[o]nce a 'case-by-case' determination of significance or degree of impact must be done . . . , the action cannot be excluded from review with a categorical exclusion [and] must be analyzed under an EA and FONSI or EIS." (Pls.' Mot. at 11.)

Defendants rejoin that the USFS properly designated extraordinary circumstances. Defendants contend that in determining whether the proposed action involves extraordinary circumstances warranting further analysis in an EA or EIS, land managers are required to consider the resource conditions and "[i]f the responsible official determines, based on the public scoping process, that it is uncertain whether the project may have a significant effect, the agency must prepare an EA, and if [the official] determines, . . . based on public scoping, that it may have a significant effect the

agency must prepare an EIS." (Defs.' Mot. at 13-14.) Defendants argue "it is difficult to envision how any agency could comply with the CE's requirement that the agency 'provide for extraordinary circumstances in which a normally excluded action *may have* a significant environmental effect,' 40 C.F.R. § 1508.4 (emphasis added), without empowering decisionmakers to decide on a case-by-case basis whether the circumstances present in each case actually involve a potential significant effect.'" (Defs.' Mot. at 14.) Defendants also argue "the fact that other Federal agencies take the same approach" and the fact that the approach was "reviewed by the CEQ itself," indicates that the USFS's approach is "reasonable and appropriate." (Id. at 15.) Defendants also point to the CEQ's notation "that the Forest Service efforts 'to clarify the effect of the existence of extraordinary circumstances on the ability to categorically exclude designated actions . . . is to be commended.'" (Id. (citing AR 23).)

Plaintiffs disagree with Defendants' position, contending that the Fuels CE violates the CEQ regulations, regardless of the CEQ determination that the Fuels CE is "in conformance with NEPA and the CEQ regulations." (AR 78.) Specifically, Plaintiffs argue the Fuels CE fails to properly identify the projects covered by the Fuels CE, but the USFS identified specific criteria governing which actions fall within the Fuels CE. The CEQ "encourages the agencies to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects." 48 Fed. Reg. 34,263, 34,265 (July 28, 1983). Further, the fact that the particular projects will be identified by the 10-Year Collaborative Implementation Strategy Plan does not

broaden the Fuels CE, it merely requires collaboration with state, local, and tribal governments. Additionally, although Plaintiffs contend the Fuels CE is an invalid case-by-case categorical exclusion, it is permissible for an agency to determine, case by case, whether a particular action fits within a CE; NEPA only prohibits an agency from creating a new CE on a case-by-case basis.

Plaintiffs also challenge the Fuels CE's extraordinary circumstances provision; however, the USFS adequately defined extraordinary circumstances when it established the list of resource conditions. Further, the CEQ specifically found that the USFS's extraordinary circumstances provisions "conform[] to [NEPA] and the CEQ regulations for implementing the procedural provisions of [NEPA]." (AR 46.) "The CEQ's interpretation of NEPA is entitled to substantial deference" because CEQ is charged by Congress with the obligation of overseeing how federal agencies implement NEPA. Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986) (citing Andrus v. Sierra Club, 442 U.S. 347, 358 (1979)).

For the stated reasons, Defendants prevail on their position and their motion for summary judgment is granted, and Plaintiffs' motion for summary judgment is denied.

b. Will the projects covered by the Fuels CE have cumulatively and/or individually significant effects on the environment?

Plaintiffs also challenge the Fuels CE, arguing the Fuels CE is improper since the projects covered by it will have cumulatively significant effects on the environment. (Pls.' Mot. at 12.) By definition, a categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the

human environment." 40 C.F.R. § 1508.4. Plaintiffs, relying on Klamath-Siskiyou Wildlands Center, 387 F.3d at 993-94, for the proposition that the total number of acres affected by a project "may demonstrate by itself that the environmental impact will be significant," argue "[t]he projects covered by the Fuels CE certainly meet the Klamath-Siskiyou standard . . . ." (Pls.' Mot. at 13.) Plaintiffs contend, since "[t]here is no limitation on the number of the times the Fuels CE can be invoked nationwide, in any particular National Forest, or in any particular watershed . . . , many individually insignificant (small) projects could be right next to each other, or close enough to one another to have a combined or cumulative effect on soils, water, fish and wildlife, without their total cumulative effect being taken into account." (Id. at 13-14.) Plaintiffs contend the projects in the Eldorado National Forest are an example of this problem. (Id. at 14.)

Plaintiffs contend "the term 'significantly,' for purposes of NEPA, requires the consideration of both context and intensity [and that i]n evaluating intensity, the agency must consider the degree to which effects are likely to be 'highly controversial.'" (Id.) Plaintiffs argue since "[a]pproximately 39,000 comments were submitted regarding the Fuels CE, including thousands of comments relating to the environmental impacts of the Fuels CE," the Fuels CE "is by definition significant, and not an allowable CE under 40 C.F.R. § 1508.4." (Id. at 15.) Finally, Plaintiffs argue that comparison of the Fuels CE with other "longstanding categorical exclusions of the agency" makes evident that the Fuels CE "is not a proper categorical exclusion." (Id.)

Defendants counter that the projects covered by the Fuels CE will not have significant cumulative effects. Defendants argue "the Departments evaluated approximately 2,500 hazardous fuel reduction projects nationwide before determining that the category of actions described in the CE will not have significant cumulative effects on the human environment." (Defs.' Mot. at 15.) Defendants argue "[n]othing in Klamath-Siskiyou . . . stands for the proposition that impacts on a large number of acres constitutes a per se significant cumulative impact . . . ." (Id. at 16.)

Defendants assert that Plaintiffs' concern about two projects being "right next to each other" without their total cumulative effects being taken into account, "is unfounded [since] CEQ regulations prohibit an agency from the segmentation of projects into pieces that, due to their small size, fall below the NEPA radar." (Id. at 16-17.) Furthermore, Defendants note that "[t]he Fuels CE is not some sort of national program of hazardous fuels reduction projects which would itself be subject to a NEPA analysis[; it] is only a procedural device under NEPA which allows an agency to identify existing categories of projects that from the agency's experience do not normally have a significant impact [and its] only 'purpose' . . . is to allow the agency to authorize low-impact projects which would otherwise have had to have been evaluated under an EA." (Id. at 17-18.)

Defendants counter Plaintiffs' argument that the Fuels CE is impermissible because it is highly controversial, stating "[t]he appropriate inquiry . . . is not whether . . . the CE is controversial, but whether there is sufficient controversy over the degree of impacts of hazardous fuels reduction projects to suggest

they will have significant impacts and preclude their authorization through the CE[; and, i]n this case there is not." (Id. at 18.) Furthermore, Defendants contend "[t]he receipt of a large number of comments opposing a proposal does not render that proposal controversial under NEPA." (Id.)

Plaintiffs also contend the Fuels CE is "improper because the class of actions includes individually significant projects." (Pls.' Mot. at 16.) Plaintiffs note that "[o]f the NEPA projects contained in [the] data call, 28 individual projects had environmental impact statements prepared for them, which meant the implementing agency considered the projects' impacts significant." (Id.) Further, Plaintiffs contend "[t]imber projects like those authorized under the Fuels CE often have significant impacts, which is why EISs are required for them." (Id.) Plaintiffs assert "[t]he record includes numerous examples of fuel reduction projects that have significant impacts," contending that "the fuel reduction projects named in the Complaint serve as examples of projects with significant individual effects that the Forest Service considers covered by the Fuels CE." (Id. at 16-17.)

Defendants rejoin that "[t]he record . . . belies [Plaintiffs'] claim." (Defs.' Mot. at 19.) Defendants contend that although "of the 2,500 projects reviewed by the Departments, twelve were found to have significant impacts[, t]his fact does not mean that the Fuels CE includes projects with significant effects," because the Departments found those twelve projects would not be covered by the Fuels CE since they "involved extraordinary circumstances." (Id.)

Defendants also argue that although "Plaintiffs list a series of ecological impacts they assert are associated with fuel

reduction projects . . . , Plaintiffs fail to link any of these alleged impacts to any of the 2,500 projects in the data set reviewed by the Departments, and fail to point to anything arbitrary or capricious in the Departments' conclusion that . . . 'none of the[] environmental effects was individually or cumulatively significant because the effects were localized, temporary, and of minor magnitude.'" (Id. at 20 (citing AR 155 at 8).)

Plaintiffs contend the public comments by state and federal agencies demonstrate the individual and cumulative significance of the projects covered by the Fuels CE. (Pls.' Mot. at 17.) Specifically, Plaintiffs assert that "[i]n their public comments to the Forest Service, several States opposed the Fuels CE because of the direct and cumulative environmental impacts." (Id. at 17-18.) Plaintiffs argue "the Forest Service chose to approve the Fuels CE over the objections of these state and federal agencies, and disregarded the evidence of individual and cumulative harm they provided." (Id. at 20.)

Defendants counter that "[t]he fact that other agencies expressed concern, or even opposition to the proposal, does not carry Plaintiffs' burden of proving the agency's action was arbitrary or capricious." (Defs.' Mot. at 20.) Defendants note that "[t]he record before the Court demonstrates that the Departments carefully evaluated and responded to all public comments." (Id. at 21.)

Plaintiffs disagree, contending the USFS's conclusion that the impacts of the projects to be covered by the Fuels CE were not individually or cumulatively significant was arbitrary and capricious. (Pls.' Mot. at 21.) Plaintiffs argue that the USFS's finding of no significance "was based primarily on: 1) a review of scientific literature on fuel reduction and forest fires; and 2) a "data call"

that consisted of a database of approximately 2,500 projects involving fuel reduction . . . ." (Id.) Plaintiffs contend those sources "do not support the Forest Service's finding of no significant cumulative effect, and the Forest Service's reliance on them was arbitrary and capricious . . . ." (Id.) Plaintiffs argue "[t]here was little or no analysis of the cumulative effects of fuel reduction projects — especially on the scale contemplated here — on fish, wildlife, water or soils [and t]he Forest Service did not review the scientific literature regarding the actual effects of fuels reduction activities on fish, wildlife, water or soils . . . ." (Id.)

Plaintiffs also contend the data does not support the USFS's finding of no cumulative significant impacts. (Id. at 22-29.) Plaintiffs argue that

> there is a cumulative effects column in the Spreadsheet Compiling Data Call Records. . . . However, the spreadsheet does not state what other projects were considered in conjunction with any particular project – if any. There is no telling whether the projects were considered to be cumulative with other projects in the same watershed or in the same National Forest, much less cumulatively with all other projects in the "data call." Nowhere in the data call is there a "quantified assessment" of the combined environmental impacts from these projects.
>
> Further, . . . the Forest Service did not determine how many projects it expects the Fuels CE to cover; the total acres it expects will be impacted; or the total amount of board feet of timber it expects to remove. The Forest Service provides no quantitative measure of cumulative "significance" in the promulgation of the Fuels CE; and no qualitative measure of cumulative "significance" in the promulgation of the Fuels CE. . . .
>
> [T]he Forest Service . . . us[ed] the "data call" as a *post-hoc* rationale for an already made decision. The Forest Service's . . . analysis was not done objectively in good faith because the agency had already decided to issue a categorical exclusion. . . .

> The data call . . . is insufficient . . . because the determination of whether individual projects had "significant effects" is based on the "personal observation" of individual Forest Service employees[;] a majority of the projects that were reviewed were actually themselves analyzed in an EA or EIS[;] the 1,000 and 4,500 acre figures the Fuels CE ultimately established were arbitrary levels and not determinative of whether there is significant individual or cumulative harm above that threshold[;] the data call does not provide adequate information to assess the impacts of these projects[; and because] many of the data call projects were not hazardous fuel treatment reduction projects at all. . . . In sum, the data call does not support the conclusion that the projects to be covered by the Fuels CE have no individual or cumulative significant environmental effects.

(Id. at 23-29.)

Defendants rejoin the record supports the USFS's conclusion that the Fuels CE will not have significant individual or cumulative impacts. Defendants assert that each of Plaintiffs' criticisms of the USFS's methodology fails because "NEPA does not obligate an agency to prepare an EIS or EA before promulgation of a CE, and the Plaintiffs cannot seek [to] impose such a requirement through the backdoor by asserting that the agency's evaluation of cumulative impacts must be equivalent to that conducted in an EA or EIS." (Defs.' Mot. at 21.) Further, Defendants argue "the agencies complied with the CEQ's directions [in 40 C.F.R. § 1507.3(b)(2), by] evaluating over 2,500 past hazardous fuel reduction projects to determine whether certain types of projects did not individually or cumulatively have significant environmental effects . . . ." (Id. at 22.) Defendants contend they were therefore in the position to conclude "that the class of projects included in the CE will not normally have significant cumulative impacts." (Id.) Defendants contend "[t]here is no evidence that the Departments did not act in good faith in collecting and evaluating past hazardous fuel projects to develop the fuels CE [and that t]he relevant legal inquiry is not whether the

Forest Service collected the data for a specific purpose, but whether the agency examined the data objectively and in good faith. . . ." (Id. at 22-23.)

Further, Defendants argue "the Forest Service was not required by either NEPA or the CEQ regulations to conduct any post-implementation monitoring before promulgating a CE [and] there is nothing inappropriate about the Forest Service's choice to utilize the observations of its trained and professional personnel as part of its methodology for reviewing the over the past fuel reduction projects." (Id. at 23-24.) Defendants argue "the agency provides a rational explanation for its reliance on the observations of field personal: 'resource specialists and stakeholders involved in the design and analysis of each specific on-the-ground project were best qualified to identify resulting environmental effects or whether extraordinary circumstances were present.'" (Id. at 24 (citing AR 139 (68 Fed. Reg at 33,817)).)

Defendants also contend Plaintiffs "misunderstand . . . how the Departments reviewed the 2,500 projects in the study[; b]ecause the Departments reviewed the projects as they were finally implemented, those projects included whatever modifications or mitigation might have been made during the NEPA procedures." (Defs.' Mot. at 25.)

Defendants contend, although Plaintiffs assert the acreage limitations adopted in the CE are arbitrary, "the Departments made a reasonable finding based on the extensive record of past projects, and that finding must be upheld." (Id.) Defendants note that the "USDA and DOI reviewed 2,500 hazardous fuels reduction projects for which the initial NEPA reviews predicted the environmental effects would not

be significant, and for which that prediction had been validated by post-implementation review[, and that a]fter reviewing th[e] data, and in response to public comment, the agencies determined [the acreage limitations for] the categorical exclusion." (Id.) Defendants contend the acreage limitations "are well within the range of acreages analyzed in the data" and "Plaintiffs point to nothing arbitrary or capricious in this approach. . . ." (Id.)

Finally, Defendants contend "the data collection form used by the Departments allowed personnel to describe significant impacts, and they were not limited to a 'binary' choice[;] the data used by the Agencies includes fuel reduction projects from a five year period, from 1998 through 2002[; and t]he inclusion of fuel reduction projects from grasslands is appropriate and should be upheld." (Id. at 25-26.)

Although Plaintiffs challenge the methodology used by the agencies, since Plaintiffs fail to demonstrate that the methodology used was "irrational," the methodology will be upheld. Marsh v. Or. Natural Resources Council, 490 U.S. at 378. Plaintiffs' contention that it was inappropriate for the USFS to use personal observations of agency experts in conducting its data call is unsupported; the USFS has not been shown unreasonable in relying on these expert opinions. Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (stating that an agency is entitled to rely on its own expert opinions). Plaintiffs' contention that it was inappropriate for the USFS to use the data call "as a post-hoc rationale for an already made decision" is also unavailing. (Pls.' Mot. at 24) "[A]n agency can formulate a proposal or even identify a preferred course of action before completing an EIS." Metcalf v. Daley, 214 F.3d 1135, 1145 (9th Cir. 2000). Furthermore, the past projects were reviewed as

implemented, not as proposed; the acreage limits in the Fuels CE are supported by the record and the choice of acreage is within the agencies' expertise; the USFS's evaluation contained sufficient information about the appropriateness of the Fuels CE; and the projects included in the evaluation were sufficient.

The agencies reviewed over 2,500 hazardous fuels reduction projects and rehabilitation projects and considered peer-reviewed scientific literature concerning the effects of hazardous fuel reduction activities before identifying the category of actions that would not normally have significant effects on the environment. 68 Fed. Reg. 33,814 (June 5, 2003); AR 139. The USFS proposed the category of actions to be covered by the categorical exclusion in a Federal Register notice, and sought public comment and review and approval by CEQ. 67 Fed. Reg. 77,038 (Dec. 16, 2002); AR 135. Before the Fuels CE was adopted, the USFS considered and responded to numerous comments from the public. 68 Fed. Reg. at 33,815-33,823; 67 Fed. Reg. at 54,623-54,627. The USFS provided reasoned explanations for their conclusions that the category of actions covered by the Fuels CE would not normally have a significant impact on the environment. The USFS's determination that the projects covered by the Fuels CE would not have cumulative or individually significant impacts on the environment was not arbitrary and capricious. Therefore, Defendants' motion for summary judgment on this issue is granted and Plaintiffs' motion for summary judgment is denied.

c. Did the USFS violate NEPA by failing to prepare an EA or an EIS for the Fuels CE?

Plaintiffs argue "NEPA and its implementing regulations require an EIS or at least an EA for the Fuels CE [since] the Fuels CE is a 'major federal action[] significantly affecting the quality of the human environment.'" (Pls.' Mot. at 30.) "[A]n EIS *must* be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'" Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)). Plaintiffs contend "[t]he Fuels CE . . . constitutes a 'rulemaking' and NEPA analysis was required for it." (Pls.' Mot. at 31.) Defendants counter "[n]either NEPA nor the CEQ's regulations require preparation of an EIS when an agency develops a categorical exclusion[, and] the caselaw squarely rejects [Plaintiffs'] claim." (Defs.' Mot. at 27.)

Plaintiffs cite Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002), and Citizens for a Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 969-70 (9th Cir. 2003), in support of their argument that the USFS was required to prepare an EIS for the Fuels CE. In Kootenai Tribe of Idaho, the Court held that the USFS was required to prepare an EIS in promulgating the roadless area conservation rule for national forests, since the rule immediately altered substantive management of almost 60 million acres of land without the need for any future decisions. In Citizens for Better Forestry, the Court stated in dicta, that the agency erred in not circulating for public comment the EA it prepared for its Forest Planning Regulation, but the decision does not address the issue whether an agency is required to prepare an EA or EIS when promulgating a CE. 341 F.3d at 970.

Plaintiffs assert "NEPA and its implementing regulations require an EIS or at least an EA for the Fuels CE" because "the Fuels CE is a 'major federal action[] significantly affecting the quality of the human environment.'" (Pls.' Mot. at 30.) Plaintiffs further argue the Fuels CE should be characterized as "adoption of new agency programs or regulations" and therefore "require[s] the preparation of an EIS outright." (Id. at 31 (citing 40 C.F.R. § 1508.18(b)(1), where it is stated "Federal Actions requiring NEPA review include '[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.'").)

However, neither NEPA nor the CEQ regulations require preparation of an EIS when an agency develops a categorical exclusion. As the Seventh Circuit stated in Heartwood, Inc. v. United States Forest Service, 230 F.3d 947, 954 (7th Cir. 2000): "CEs are not proposed actions, they are categories of actions for which an EA or EIS has been deemed unnecessary . . . . For these procedures, the CEQ does not mandate that agencies conduct an EA before classifying an action as a CE and we must give great deference to the CEQ's interpretation of its own regulations." See also Trustees for Alaska, 806 F.2d at 1382 (stating "[t]he CEQ's interpretation of NEPA is entitled to substantial deference."). The CEQ's interpretation of its own implementing regulations is "controlling" unless it is "plainly erroneous or inconsistent with the regulation." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (internal quotations omitted). The CEQ regulations specifically provide the procedures for how agencies are to develop categorical exclusions: agencies must publish all procedures for implementing NEPA in the Federal Register

and "the procedures shall be adopted only after an opportunity for public review and after review by the [CEQ] for conformity with [NEPA] and the[] regulations." 40 C.F.R. § 1507.3(a). Here, the Final Federal Register Notices for the Fuels CE explain that "establishing categorical exclusions does not require preparation of a NEPA analysis or document." 68 Fed. Reg. at 33,823. Therefore, Plaintiffs' motion for summary judgment on this issue is denied, and Defendants' motion is granted.

2. Does the application of the Fuels CE to the Eldorado National Forest projects violate NEPA?

Plaintiffs also seek summary judgment on the issue that the USFS unlawfully applied the Fuels CE to the projects in the Eldorado National Forest. (Pls.' Mot. at 31.) Defendants counter that "[e]ach of the challenged projects meets the specifications for inclusion in the Fuels CE [and that f]or each project, the Forest Service undertook public scoping to help identify potentially significant issues[;] undertook studies of the proposed actions to determine whether extraordinary circumstances were present that might preclude the use of the Fuels CE[; and] provided a reasoned explanation for its application of the Fuels CE to these projects and its determination that no extraordinary circumstances were present." (Defs.' Mot. at 30-31.)

"If a proposed action fits within a categorical exclusion, NEPA review is not required unless there are 'extraordinary circumstances' related to the proposed action." Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 858 (9th Cir. 1999) (quoting 40 C.F.R. § 1508.4); California v. Norton, 311 F.3d at 1176 (noting that "[i]n many instances, a brief statement that a categorical

exclusion is being invoked will suffice"). When determining whether a proposed action fits within a categorical exclusion, a "scoping process is used to 'determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action.'" Alaska Ctr. for the Env't, 189 F.3d at 858 (citing 40 C.F.R. § 1501.7). The arbitrary and capricious standard is applied "to an agency's determination that a particular action falls within [a] categorical exclusion[]." Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1456 (9th Cir. 1996). "When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision. . . . To determine whether agency action is arbitrary or capricious, a court must consider 'whether the decision was based on a consideration of the relevant factors and whether there has been clear error of judgment.'" Alaska Ctr. for the Env't, 189 F.3d at 859 (internal citations omitted).

Defendants argue the USFS reasonably determined there are no extraordinary circumstances related to any of the named projects. Defendants contend "[f]or each of the projects challenged by Plaintiffs, the Forest Service determined and documented that no extraordinary circumstances exist that would preclude the use of the Fuels CE." (Defs.' Mot. at 32 (citing AR 1917, 2371, 2759).)

Plaintiffs argue this finding was arbitrary and capricious because it "overlooked several important impacts of the projects and/or reached conclusions that were contrary to the evidence before the agency." (Pls.' Mot. at 37.) Plaintiffs contend this conclusion was reached "without considering the effect of other projects." (Id. at 38.) Plaintiffs also argue that "[a]lthough the three projects on the Eldorado National Forest were approved within months of each

other, none of the Decision Memos mention either of the other projects as either past, present or reasonably foreseeable projects." (Id. at 38.) Plaintiffs contend "[n]umerous 'resource conditions' that could constitute 'extraordinary circumstances' are present within each project area." (Id. at 39.)

Further, Plaintiffs argue "[t]he Forest Service concluded that these projects would not significantly affect the resource conditions without considering the ten factors that define significance under the NEPA regulations." (Id. at 40 (citing 40 C.F.R. § 1508.27).) Plaintiffs argue "[i]nstead, the Forest Service makes conclusory statements that the projects will have no significant impacts." (Id.)

Specifically, Plaintiffs argue the Eldorado projects will have significant cumulative impacts on wildlife, water quality, and will not reduce fire risk. Plaintiffs argue "[t]he Eldorado projects will degrade habitat for several sensitive species by simplifying mature forest stand structures, logging and removing trees up to 30" in diameter, and reducing the density of downed logs and snags [and] will adversely affect these species' ability to breed, feed, and shelter. . . ." (Id. at 32.) Plaintiffs contend the USFS has not provided a convincing statement of reasons why potential effects on the California spotted owl are insignificant. (Id.; Bond Decl. ¶¶ 36-43.) Furthermore, Plaintiffs argue "[t]he Eldorado projects include activities that will directly contribute to an increase in sediment in the watersheds, which adversely affects water quality and fisheries habitat." (Pls.' Mot. at 34.) Plaintiffs also note that "the Forest Service's assertion that these projects will reduce wildfire potential is not supported in the record. In fact, projects such as this may

increase fire risk." (Id. at 35; Odion Decl.) Plaintiffs also contend the projects in the Eldorado National Forest will have significant individual impacts on various species, including the California spotted owl, and therefore use of the Fuels CE is prohibited. (Pls.' Mot. at 36; Bond Decl.)

Defendants rejoin: "Plaintiffs . . . err in suggesting that the mere presence of a resource condition is sufficient to preclude the use of a categorical exclusion." (Defs.' Mot. at 32.) Defendants note that "Forest Service implementing procedures for categorical exclusions state that '[t]he mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion[; i]t is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.'" (Id. (citing 67 Fed. Reg. 54,622, 54,627 (Aug. 23, 2002)).) Defendants argue "the Forest Service appropriately considered both the presence of threatened or sensitive species and cultural or archaeological sites and determined neither constitute extraordinary circumstances precluding the use of the Fuels CE for any of the challenged projects." (Defs.' Mot. at 32.) Defendants assert "[a] Biological Evaluation and Assessment (BEA) was prepared for each project" which "examine[d] the direct, indirect, and cumulative effects of the proposed action on sensitive and threatened wildlife species and habitat if present in the project area." (Id. at 33.) Defendants assert "[t]he Forest Service provided reasoned explanations for its conclusions [and] each project will require limited operating periods to protect known spotted owl and goshawk nest sites and includes protection measures designed to minimize any potential project effects." (Id. at 33-34.) Defendants contend "[c]ontrary to

Ms. Bond's assertions, the Forest Service addressed cumulative effects to sensitive species and threatened species in its BEAs." (Id. at 34-35.)

Defendants also contend "[t]he Forest Service surveyed each project area for the presence of archaeological, historic, and cultural resource sites, and analyzed potential project effects to these sites for each. The Forest Service set out specific protection measures that will be applied to these resources, including flagging and avoiding identified sites." (Id. at 36.)

Finally, Defendants contend that although Plaintiffs assert the projects on the Eldorado National Forest will have significant cumulative impacts on water quality, and will not meet the USFS's goal of reducing the risk of fire, "these allegations should have been [made against] the promulgation of the Fuels CE as a whole, rather than [against] the specific named projects." (Id. at 37.) Defendants also assert "even if Plaintiffs' allegations were properly raised against the specific projects, they are without merit." (Id.)

The issue is whether the USFS "provided a reasoned decision . . . specifically indicat[ing] that during the scoping process there were no extraordinary circumstances found that would warrant the preparation of an EA or EIS" for any of the Eldorado National Forest projects. Alaska Ctr. for the Env't, 189 F.3d at 859.

For each of the projects Plaintiffs challenge, the USFS adequately determined and documented that no extraordinary circumstances exist which would require the preparation of an EA or an EIS. (AR 1916, 2371, 2759.) The USFS prepared a BEA for each project which evaluated the direct, indirect, and cumulative effects of the proposed action on sensitive and threatened wildlife species, and

habitat if present in the project area. (AR 1946-60, 2381-2412, 2459-61, 2792-2817.) The USFS specifically considered the effects on the California spotted owl. (AR 1956, 2406, 2803.) The USFS then determined there would be no long-lasting effects, and any effects would be minimized by using limited operating periods, and prepared reasoned explanations for these conclusions. (AR 1167, 1912, 1917, 2366, 2754-55, 2759.)

In its BEAs, the USFS also surveyed each project area for the presence of archaeological, historical, and cultural resource sites; analyzed potential effects at these sites; set out specific protection measures to be applied at the sites; and then reasonably concluded the proposed projects will not have a significant effect on those sites. (AR 1162-63, 1166-67, 1912-13, 2014, 2367, 2754-55, 2764.) The USFS also conducted a Riparian Conservation Objectives Analysis for each project and adequately explained its conclusion that the projects would not have a significant effect on water quality or aquatic habitat. (AR 1968, 2460.) Finally, although Plaintiffs contend the projects could increase fire risk (see Sierra Club v. Eubanks, 335 F. Supp. 2d 1070 (E.D. Cal. 2004), and Odion Decl.), the USFS adequately explained that the Eldorado National Forest projects involve understory thinning designed to reduce the intensity and severity of fire once it starts. (AR 1908, 2361, 2751.)

"Employing the deferential standard of review, which . . . must [be used] when reviewing factual conclusions within the agency's expertise, [I] conclude that the Forest Service considered the relevant factors and determined that no extraordinary circumstances were present. Accordingly, the Forest Service did not violate NEPA." Alaska Ctr. for the Env't, 189 F.3d at 859.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment is denied and Defendants' motion for summary judgment is granted. The Clerk of the Court shall enter judgment in favor of Defendants and against Plaintiffs.

IT IS SO ORDERED.

DATED: September 16, 2005

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge